

No. 17-60

IN THE
Supreme Court of the United States

CITY OF BLOOMFIELD,
Petitioner,

v.

JANE FELIX, B.N. COONE,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Tenth Circuit**

**BRIEF AMICUS CURIAE OF THE
FOUNDATION FOR MORAL LAW
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

Amicus Curiae Foundation for Moral Law (“the Foundation”) (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers and the right to acknowledge God in the public arena.

The Foundation believes America was founded as a constitutional republic based upon legal and moral principles set forth in the Bible. The Ten Commandments are therefore the moral foundation of law.

INTRODUCTION

These commandments, which, like a collection of diamonds, bear testimony to their own intrinsic worth, in themselves appeal to us as coming from a superhuman or divine source, and no conscientious or reasonable man has yet been able to find a flaw in them. Absolutely flawless, negative in terms, but positive in meaning, they easily stand at the head of our whole moral

¹ Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party’s counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

system, and no nation or people can long continue a happy existence in open violation of them.

Moore v. Strickling, 46 W. Va. 515, 33 S.E. 274, 277 (1899).

SUMMARY OF ARGUMENT

From whence come the roots of the American Republic?

Many look to Greece and Rome. But John Adams wrote: "As much as I love, esteem and admire the Greeks, I believe the Hebrews have done more to civilize the world. Moses did more than all their legislators and philosophers."²

Moses was a prophet, but he was much more: he was a judge, military commander, statesman, and lawgiver whose legal code has exerted great influence on the Western world.

As the Renaissance began and the modern absolutist state emerged, Western political philosophers sought to develop, as an alternative to absolute monarchy, the ideal of a republic. The Greek democracies, however, had been unstable and short-lived, and the Roman republic had degenerated into an empire. Western political philosophers turned for

² John Adams, handwritten comments on his copy of *Outline of an Historical View of the Progress of the Human Mind*, reprinted in Zoltan Haraszti, *John Adams and the Prophets of Progress* 246 (1952).

guidance to a governmental model more ancient than Greece or Rome: the Hebrew Republic.

The Hebrew Republic was notably egalitarian and greatly influenced the political thinkers who laid the intellectual foundation for American constitutional government, including the separation of powers. See Joshua Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* (2008).

The Ten Commandments, as an expression of Hebrew political philosophy, reflect the “laws of nature and of nature’s God,” that “all men are created equal” and have unalienable God-given rights, and that government is to be by consent of the governed. These principles find overt expression in the founding document of the America nation, the *Declaration of Independence*, which invokes “the Laws of Nature and of Nature’s God” and states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed

Without denying that the Ten Commandments have religious significance, the Foundation will establish that the Decalogue stands at the very heart

of our legal system.³ Therefore, the placement of a Ten Commandments monument at the seat of government in Bloomfield, New Mexico is entirely consistent with the legal relationship of the Decalogue to the foundational principles of American government.

ARGUMENT

I. The Court should grant certiorari because (1) the circuit courts and other lower courts have been divided on the issue of religious displays in the public arena, and (2) this Court's own jurisprudence on this issue has been divided and confusing.

Because Counsel for the City of Bloomfield have thoroughly established the existence of a circuit split, the Foundation will not dwell extensively upon that issue. We do urge the Court, however, to use this case as an opportunity to clear up conflicts not only in lower court rulings but also in its own jurisprudence.

Not only lower courts, but school districts, city councils, county governments, state officials, and others are uncertain as to the appropriate content of government displays in the public arena. They look to this Court for guidance.

³ The United States Code, “the official codification of the general and permanent laws of the United States,” includes the *Declaration of Independence* in the section entitled “The Organic Laws of the United States of America.” See *Black’s Law Dictionary* 1274 (10th ed. 2014) (defining “organic law” as “[t]he body of laws (as in a constitution) that define and establish a government”).

Justice Thomas in a dissent from the denial of certiorari described the contradictory nature of this Court's Establishment Clause decisions and the resulting confusion in the lower courts:

Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles.

....

Since the inception of the endorsement test, we have learned that a creche displayed on government property violates the Establishment Clause, except when it doesn't.

....

Likewise, a menorah displayed on government property violates the Establishment Clause, except when it doesn't.

....

A display of the Ten Commandments on government property also violates the Establishment Clause, except when it doesn't.

....

Finally, a cross displayed on government property violates the Establishment Clause, as the Tenth Circuit held here, except when it doesn't.

....

To any truly "reasonable observer," these lines of disagreement may seem arbitrary at best. But to be fair to the Tenth Circuit, it is our Establishment

Clause jurisprudence that invites this type of erratic, selective analysis of the constitutionality of religious imagery on government property. These cases thus illustrate why “[t]he outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges.”

Utah Highway Patrol Assn. v. American Atheists, 132 S. Ct. 12, 13, 17-19, 21 (2011) (Thomas, J., dissenting from the denial of certiorari) (citation omitted).

II. The Ten Commandments and similar displays represent a philosophy of government based on higher law and unalienable God-given rights.

Those who advocate for an absolute separation of church and state often see an absolute distinction between the sacred and the secular. The Ten Commandments, however, have moral and historical significance as well as religious meaning. As Chief Justice Rehnquist has stated: “Of course, the Ten Commandments are religious.... But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning....” *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion). Justice Breyer similarly observed:

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper

standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.

Id. at 701 (Breyer, J., concurring in the judgment).

Ten years before *Van Orden* a federal district court had made the same finding about the role of the Ten Commandments in governing social conduct.

The codes are often referred to for their religious importance, however, in fact, in Hebraic history they were in part legal codes governing the social conduct of the societies to which they applied. The Biblical books are ancient legal codes and histories. It would be wrong to assume the Hebraic references are merely religious commands.

Oliverson v. West Valley City, 875 F. Supp. 1465, 1473 n.5 (D. Utah 1995).

The Bloomfield Ten Commandments display constitutes a recognition of the political philosophy upon which this nation was founded. Robert J. Barth, Associate Dean and Professor at the Oak Brook College of Law and Government Policy, explains:

[I]f you combine the philosophy of government of our Founders with the form of government chosen, you create a republican form of government that presupposes a Creator as the source of unalienable rights and the definer of human dignity and equality. This form of government acknowledges the existence of the Creator as a self-evident truth and yet recognizes the distinct differences between the jurisdiction of the church and the civil government. . . . This jurisdictional separation between the acknowledgement of God as an essential presupposition of good government (unalienable rights, equal protection, due process) and matters of worship, faith, and religious practices, is the essence of the legitimate separation between church and state.⁴

The Ten Commandments state the foundational principles of American law, including the following:

- Respect for life, as reflected in the Commandment “Thou shalt not kill” and in homicide laws.
- Respect for property, as reflected in the Commandments “Thou shalt not steal” and “Thou shalt not covet” and in property laws.

⁴ Robert J. Barth, *Philosophy of Government vs. Religion and the First Amendment*, 5 *Oak Brook College J. Law & Gov't Policy* 75-76 (2006).

- Respect for family, as reflected in the Commandments “Honor thy father and thy mother” and “Thou shalt not commit adultery” and in family laws.
- Respect for truth as reflected in the Commandments “Thou shalt not take the name of the Lord thy God in vain” and “Thou shalt not bear false witness” and in perjury and fraud laws.
- Respect for God as reflected in the first four Commandments and the recognition of God as the source of governmental authority and the source of human rights.⁵

A Lexis search by the author of this *amicus* brief in March 2002 revealed at least 1,100 cases of record in which the terms “Ten Commandments” or “Decalogue,” or individual commandments by number were cited by American courts of record.⁶

If the Ten Commandments are of such legal and historical significance that courts frequently cite them as legal authority in judicial opinions, they certainly are of such legal and historical significance that they may be displayed in front of the halls of government.

⁵ For a detailed analysis of the precepts of Hebrew law, see John Eidsmoe, *Historical and Theological Foundations of Law* 369-95 (2016).

⁶ A detailed analysis of these cases may be found in Eidsmoe, *supra* n.5, at 431-68. See also John Eidsmoe, *The Use of the Ten Commandments in American Courts*, 3 Liberty U. L. Rev. 15 (2009).

III. The Ten Commandments and the Hebrew law they represent were the primary source early Western jurists used to develop models of republican government.

As early Western jurists developed models of republican government, they looked not primarily to Greece and Rome but nearly a thousand years earlier to the Hebrew republic.⁷

When St. Patrick (A.D. 5th century) evangelized Ireland, he left his converts with a writing called *Liber ex Lege Moisi* (“The Book of the Law of Moses”). When the High King of Ireland ordered Patrick to lead a commission to draft the *Senchus Mor* or

⁷ Greco-Roman law was itself influenced by Hebrew jurisprudence. Clement of Alexandria (c. 150-215) stated that Moses was Plato’s ideal philosopher-king. Hugo Grotius (1583-1645) wrote:

The most ancient Attic laws, whence in after times the Roman were derived, owe their origin to Moses’s laws. ... Who may not believe that, seeing the law of Moses had such an express image of the divine will, the nations did well in taking their laws thence? Which that the Grecians did, especially the Attics, is credible. Whence the Attic laws and the Roman twelve tables, which sprang thence, bear so much similitude with the Hebrew Laws.

Quoted in E.C. Wines, *Commentaries on the Laws of the Ancient Hebrews* 335 (American Vision 2009) (1853). Wines observed: ‘The similitude between the Grecian and Mosaic laws have been noticed by many learned men besides Grotius; as Josephus, Clemens Alexandrinus, Augustine, Selden, Gale, Cunnaeus, Serranus, Sir Matthew Hale, and Archbishop Potter.’ *Id.* at 335.

written legal code of Ireland, his commission employed Druid law but only insofar as it was consistent with the Old and New Testaments.⁸

When Alfred the Great drafted the Book of Dooms (A.D. 890), the first written legal code to govern all of England, he began with the Ten Commandments and integrated into the code Scriptural passages from the Old and New Testaments.⁹

Rabbi Moses ben Maimon (Maimonides) (A.D. 1135-1204) was a towering medieval intellect whose *Mishneh Torah* codified the Torah, the Talmud, and the writings of early medieval Jewish scholars. Maimonides' works, which made Jewish law more readily available to Western scholars, formed the basis for the commercial codes in much of Europe.¹⁰

In the medieval period governmental authority was mediated through a complex system of vassal/lord relationships that included trading guilds, civic councils, cathedrals, monasteries, and other institutions. During the Renaissance and the Enlightenment, however, the theory emerged that the king and his government stood above all other

⁸ Seumas MacManus, *The Story of the Irish Race* 132-33 (BiblioLife 1990) (1921). Cf. Eidsmoe, *Historical and Theological Foundations of Law*, 410, 766-73.

⁹ 1 *Ancient Laws and Institutes of England* 45-101 (printed by command of His Late Majesty King William IV, 1840). For a defense of the authenticity of this portion of Alfred's *Dooms*, see Eidsmoe, *Historical and Theological Foundations of Law* 825-28.

¹⁰ Rousas J. Rushdoony, *The Institutes of Biblical Law* 788-89 (1973).

forms of authority.¹¹ This doctrine fit well with the English Stuart kings' view of the divine right of kings, the declaration attributed to King Louis XIV "L'etat, c'est moi" ("I am the State"), and the absolutist ideology of Thomas Hobbes expressed in his classic work, *Leviathan*.

In opposition to the rise of monarchical absolutism, jurists in the West sought to develop a countervailing republican model of government. In doing so, they sought guidance from the Judeo-Christian tradition, the Mosaic laws, and especially the Ten Commandments.

The Protestant Reformation fostered republican thinking. Martin Luther (1483-1546), a student of law, advocated the old Teutonic Anglo-Saxon common law that emphasized decentralized government and was based upon natural law and natural rights. Luther believed the Ten Commandments were the perfect expression of natural law:

Natural law is the Ten Commandments. It is written in the heart of every human being by creation. It was clearly and comprehensively put on Mount Sinai, finer indeed than any philosopher has ever stated it. Natural law, then, is created and written in the heart; it does not come from men but is a created Law to which everyone who hears it cannot but consent.¹²

¹¹ John B. Morrall, *Political Thought in Medieval Times* 60-61 (1962).

¹² 1 Ewald M. Plass, *What Luther Says* 428 (1959).

On another occasion he wrote:

The Decalog is not of Moses, nor did God give it to him first. On the contrary, the Decalog belongs to the whole world; it was written and engraved in the minds of all human beings from the beginning of the world.¹³

Carolus Sigonius (c. 1524-1584), an Italian Renaissance scholar of Roman and Greek political systems, wrote a treatise entitled *The Hebrew Republic*¹⁴ which enjoyed wide circulation and profoundly influenced later writers.

Petrus Cunaeus (1586-1638) is remembered for *De Republica Hebraeorum (The Hebrew Republic)*,¹⁵ called “the most powerful statement of republican theory in the early years of the Dutch Republic.”¹⁶ Cunaeus described Moses as the great lawgiver who was the “first to write and publish laws so that the people might learn what was right and what was wrong, and which sanctions might steady the state Almighty God had ordered to be set up in Palestine.”¹⁷ He surveyed Hebrew agrarian laws, criminal statutes, and military policies, the role of

¹³ 2 Plass, *What Luther Says* 748.

¹⁴ Carlo Sigonio, *The Hebrew Republic* (Shalem Press, 2010) (1582).

¹⁵ Petrus Cunaeus, *The Hebrew Republic* (Shalem Press, 2006) (1617).

¹⁶ Richard Tuck, *Philosophy and Government, 1572-1651*, at 169 (1993).

¹⁷ Cunaeus, at 12.

judges and priests, and the service of the Temple—all with frequent citations to Maimonides, Josephus, Philo, Sigonius, and others. In his preface he declared:

I ask you, illustrious Members of States, to study over and again the Hebrew Republic—the holiest and best of all—which I have described in this book. It contains ideas that kings, leaders, and the administrations of republics may adopt for their own use.¹⁸

Johannes Althusius (c. 1557-1638) was a professor of law, theology, and philosophy. His classic work, *Politica*,¹⁹ offered a legal and theological justification for the Dutch secession from Spain and a grand design for federalism based on Scripture and natural law. In the 1614 preface he stated:

The precepts of the Decalogue are included to the extent that they infuse a vital spirit into the association and symbiotic life that we seek, and that they prescribe and constitute a way, rule, guiding star, and boundary for human society. If anyone would take them out of politics, he would destroy it; indeed, he would destroy all symbiosis and social life among men. For what would human life be without the piety of the first table of the Decalogue, and

¹⁸ *Id.* at 6.

¹⁹ Johannes Althusius, *Politica* (Frederick S. Carney ed. & trans., Liberty Fund 1995) (1603, 1614).

without the justice of the second? What would a commonwealth be without communion and communication of things useful and necessary to human life? By means of these precepts, charity becomes effective in various good works.²⁰

Explaining that the rule for the magistrate is “the Word of God alone,” Althusius connected each commandment of the Decalogue to particular duties of the magistrate.²¹ Stating that all governmental authority derives indirectly from the Commandment “Honor thy father and thy mother,” he nonetheless argued that subjects and lesser magistrates have a right to resist and interpose against a tyrant.²² Althusius believed that the Mosaic law, and the Ten Commandments in particular, were foundational to Western republicanism.

Hugo Grotius (1583-1645) is often called the “father of international law,” but along with his classic *The Rights of War and Peace*,²³ he also published a work of Christian apologetics, *The Truth of the Christian Religion*.²⁴ In this latter work he argues that “the most ancient Attick Laws, from whence the Roman were afterwards taken, owe their Origins to the Law of Moses.”²⁵ In *War and Peace* he

²⁰ Althusius, *Politica*, 11-12.

²¹ *Politica*, 143-44.

²² *Politica*, 198-200.

²³ Hugo Grotius, *The Rights of War and Peace* (A.C. Campbell, trans., M. Walter Dunne 1901) (1625).

²⁴ Hugo Grotius, *The Truth of the Christian Religion* (John Clarke trans., J.F. & C. Rivington 8th ed. 1777) (1627).

²⁵ *Id.* at 26 (Book I, § 15).

argued that international law could be binding on both Christian and non-Christian nations because of their common understanding of natural law. Mosaic Law can be useful in understanding natural law because

what it enjoins is not contrary to the law of nature. For since the law of nature is perpetual and unchangeable, nothing contrary to it could be commanded by God, who is never unjust. Besides the law of Moses is called in the xix. Psalm an undefiled and right law, and St. Paul, Rom. Vii. 12, describes it to be holy, just, and good.²⁶

An English jurist who carried this idea forward was John Selden (1584-1654), described by John Milton as “the chief of learned men reputed in this land.”²⁷ A member of Parliament, Selden drafted the Petition of Right in 1628 and is well known for his works on English legal history and constitutionalism. But he was first and foremost a Hebrew scholar; among his foundational writings were *De Successionibus in Bona Defuncti ad Leges Ebraeorum* (1636), *De Successione in Pontificatum Ebraeorum* (1636), *De Jure Naturali et Gentium Juxta Disciplinam Ebraeorum* (1640) (developing a theory of international law based upon the laws of Noah in Genesis), and *De Synedriis et Prefecturis Juridicis Veterum Ebraeorum* (1650-55) (trilogy on the Jewish Sanhedrin). He concluded that the English common

²⁶ *War and Peace* 28 (Book I, Ch. 1, § 17)

²⁷ John Milton, *Areopagitica* (1644).

law reflected eternal principles of common law. In fact, King James I imprisoned Selden in the Tower of London for five weeks for arguing that the Parliament was an ancient institution descended from the Anglo-Saxon Witenagemot and therefore not dependent upon the king for its existence and authority. Selden's scholarship provided a foundation in Hebrew law upon which later jurists constructed republican models of government.

Sir William Blackstone (1723-1780), whose *Commentaries on the Laws of England* (1765-69) sold almost as widely in America as in England, saw the English common law as ancient, rooted in the Anglo-Saxon laws and much earlier, and having "in great measure weathered the rude shock of the Norman conquest."²⁸ He believed that human law, to be valid, had to conform to the higher law of God, which consisted of "the revealed or divine law, and they are to be found only in the Holy Scriptures."²⁹ He also recognized that the "law of nature [was] coeval with mankind, and dictated by God himself."³⁰ The revealed law and the law of nature, he said, are of "equal strength and perpetuity."

Yet undoubtedly the revealed law is of infinitely more authenticity than the moral system which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only

²⁸ 1 *Commentaries* *17.

²⁹ *Id.* *42.

³⁰ *Id.* *41.

what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.³¹

Blackstone emphasized that the revealed law and the law of nature are the foundation of law: “Upon these two foundations, the law of nature and the law of revelation depend all human laws; that is to say, no human law should be suffered to contradict these.”³²

A Westlaw search conducted by the writer of this brief in January 2011 revealed 20,780 citations to Blackstone (although a few of these may have been to a party named Blackstone), including 6,745 during the years 1789-1899, 6,512 during the years 1900-1959, and 7,523 during the years 1960-2011, demonstrating that Blackstone’s view of law is highly relevant today.

A 2008 book by Joshua Berman, Senior Lecturer at Bar-Ilan University, contends that the Pentateuch is the world’s first model of a society in which politics and economics embrace egalitarian ideals.³³ Berman notes that under the Mosaic Law “[t]he king is neither the source of the law nor even its adjudicator, as judicial powers are granted to others in the polity

³¹ *Id.* *42.

³² *Id.*

³³ Joshua Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* (2008).

as laid out in Deuteronomy 16:18-22 and 17:8-13
....”³⁴

What is distinct in Deuteronomy is that the king must copy and read from “this Torah” about a wide range of issues, of which almost none pertains to kingship per se. In fact, the purpose of his study, “so that he may learn to revere the Lord his God to observe faithfully every word of this Torah as well as these laws,” essentially places him on a par with the common citizen, whose responsibility in this regard is expressed in Deuteronomy in identical terms.... Indeed, unlike in Mesopotamia, where the king was issued responsibility for the law, in Israel the entire community is the recipient of the law. The upkeep of the laws in Deuteronomy is a responsibility shared by every member of the society.³⁵

Berman further states: “Central to republican schemes—and Deuteronomy’s is no exception—is the notion of a mixed government and a degree of separation of powers.”³⁶ Deuteronomy, therefore, “illustrates notions of separation of powers that have usually been considered quite recent.”³⁷

In a 2010 book, Eric Nelson, a Professor of Government at Harvard, surveyed the Hebrew

³⁴ Berman, at 59.

³⁵ *Id.* at 63.

³⁶ *Id.* at 78

³⁷ *Id.*

influence upon European political thought, beginning with Flavius Josephus who “first suggested to Europeans that Israelite society could be regarded as a *politeia*—a political constitution of the sort familiar to Greek philosophy—and that Moses could be understood as its lawgiver (*nomothetes*).”³⁸ Nelson traces the development of European political thought based on the Hebrew model from Maimonides to the *Catalogus omnium praeceptorum legis Mosaicae* (*Catalogue of All of the Precepts and Laws of Moses*) (1533) through the works of Lively, Ainsworth, Lightfoot, Pococke, Coleman, Spencer, Selden, Bodin, Grotius, Bertram, Junius, Zepper, Stephani, Harrington, Spinoza, and Hobbes.³⁹ He explains that earlier jurists saw good and bad aspects in monarchy, oligarchy, and democracy, but “[i]n the middle of the seventeenth century, however, we find republican authors making a new and revolutionary argument: they now begin to claim that monarchy per se is an illicit constitutional form and that all legitimate constitutions are republican.”⁴⁰ “[T]his rupture,” he states, “was provoked by the Protestant reception of a radical tradition of rabbinic Biblical exegesis, which

³⁸ Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* 89 (2010).

³⁹ Because Harrington, Spinoza, and Hobbes are not regarded as Judeo-Christian thinkers, their study of the Hebrew republic is even more significant. Volume II of Harrington’s *The Art of Lawgiving* (1659) is entitled *The Commonwealth of the Hebrews*. Part Three of Hobbes’s *Leviathan* (1651) is entitled ‘Of a Christian Commonwealth.’ Chapter 35, ‘Of the Significance of the Kingdom of God,’ concludes that the New Testament phrase ‘kingdom of God’ refers to the Hebrew commonwealth. Spinoza’s *Tractatus Theologico-politicus* (1670) likewise discusses the *Repubblica Hebraeorum* at length.

⁴⁰ Nelson, at 3.

understood the Israelite request for a king in I Samuel as an instance of the sin of idolatry. This embrace of ‘republican exclusivism’ ... marks a crucial turning point in the history of European political thought.”⁴¹ Nelson concludes:

For roughly 100 years—from the time of Bertram until the time of Spinoza—European Protestants made the Hebrew Bible the measure of their politics. They believed that the same God who thundered from Sinai, and who later sent his son into the world, had revealed to Israel the form of a perfect republic. They labored with the help of their rabbinic authorities to interpret his design and attempted in their own societies to replicate it as closely as possible. In the process, they made crucial contributions to the political thought of the modern world. Republican exclusivism, redistribution, and toleration have all been defended on different grounds in the intervening centuries; but in the beginning, all were authorized by the divine will made manifest in the constitution of the Hebrew republic.⁴²

The Ten Commandments, then, stand for a philosophy of law and government that is central to the American system. Popular support for the display of the Ten Commandments is consonant with this history.

⁴¹ *Id.*

⁴² Nelson, at 139.

IV. The Hebrew Law symbolized by the Ten Commandments had a major formative influence in early America.

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

McGowan v. Maryland, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting). This view of the divine basis of human rights, which, of course, is embedded in the Declaration of Independence, derives not from Greek philosophy or Roman jurisprudence but from the laws of the ancient Hebrews.

The early English colonists in America used the Mosaic Law as the basis of their legal codes. Jamestown's *Articles, Lawes, and Orders, Divine, Politique, and Martial for the Colony in Virginia*, most likely the first English language legal code in the Western Hemisphere, contains all of the Ten Commandments except the prohibition of graven images.⁴³

Rev. Nathaniel Ward (1578-1652), a clergyman who had legal training, drafted *The Massachusetts*

⁴³ Virtual Jamestown, *For The Colony in Virginea Britannia. Lawes Divine, Morall and Martiall, &c.* (1611), <https://goo.gl/8Lgorp>.

Body of Liberties (1641) which served as a model for legal codes throughout New England. Numerous sections were taken directly from the Mosaic Law.⁴⁴ As John Winthrop recorded, when Indian nations sought the protection of the Massachusetts colony, the colony did not demand that they become Christians but did ask them to agree to follow the Ten Commandments, to which they assented.⁴⁵

Dr. Eran Shalev of the University of Haifa demonstrates that early Americans believed America to be in some way a model of Israel.⁴⁶ Some compared the thirteen American colonies to the twelve (by some counts thirteen) tribes of Israel and saw those tribes, like the American colonies, as independent states joined into a confederate republic. Puritans and other Calvinists strongly emphasized the Old Testament and the importance of the Mosaic Law. As Shalev states:

[The Puritans] introduced the ‘chosen people’ doctrine into the New World and viewed themselves as the successors of the Children of Israel and the bearers of a renewed covenant with God. ... [M]any European and Atlantic communities similarly felt themselves to be the new Israel in the seventeenth century. ... One of

⁴⁴ Nathaniel Ward *Massachusetts Body of Liberties*, Hanover Historical Texts Project, <https://goo.gl/zCE3pn>.

⁴⁵ John Winthrop, *The Journal of John Winthrop 1630-1649*, at 232-35 (Richard S. Dunn and Laetitia Yeandle eds., Harvard Univ. Press 1996).

⁴⁶ *American Zion: The Old Testament as a Political text from the Revolution to the Civil War* (2013).

its lasting intellectual legacies was the central role that the Old Testament played in American public life. ... And it was after the Bible's primacy began to corrode in Europe that Americans performed a last great act of political Hebraism, as the citizens of the young American republic witnessed a remarkable effort to construct their newly established polity as an Old Testament nation, an American Zion.⁴⁷

In 1783 Yale President Ezra Stiles preached a sermon entitled "The United States Elevated to Honor and Glory" emphasizing that America's identification with Israel would bring God's blessing in prosperity and national splendor.⁴⁸ Other writers and speakers compared America's oppressors to villains of the Bible such as Haman, Antiochus Ehipanes, Eglon, and Nebuchadnezzar. In turn, America's heroes were compared to Biblical deliverers such as Gideon, Deborah, Barak, and Judas Maccabeus. Supporters of American independence such as Harvard President Samuel Langdon, Gad Hitchcock, Nathaniel Whitaker, James Dana, Samuel Cooper, Joseph Huntington, and others compared American independence to Israel's exodus from Egypt and believed God had chosen America as he had chosen Israel.⁴⁹ Shalev concludes:

The fingerprints of the Old Testament were—still are—particularly evident in the

⁴⁷ *Id.* 3-4.

⁴⁸ *Id.* at 9-10.

⁴⁹ *Id.* at 15-83.

language of chosenness, itself, of course, a Hebrew concept. What has widely become known as the American ‘mission,’ the idea that the United States is endowed with an errand to promote liberty, was formed closely related to the belief that the United States was the Israel of its time.⁵⁰

Those who insist that the American republic was founded upon a Greco-Roman model rather than a Hebraic model would do well to study Michael Novak’s *On Two Wings: Humble Faith and Common Sense at the American Founding* (2002). Novak dispassionately demonstrates that America’s founders drew from both Judeo-Christian and Greco-Roman traditions and did not consider them incompatible. Sermons of the founding era frequently quoted from the Bible and Greco-Roman sources in the same paragraph.

Other works on the Hebraic origin of modern legal doctrines include:

- E.C. Wines, *Commentaries on the Laws of the Ancient Hebrews* (American Vision 2009) (1853) (stating that modern legislators “have but propagated and applied truths and principles, established by [Moses,] the first, the wisest, the ablest of legislators”).
- Edward J. White, *The Law in the Scriptures with Explanations of the Law Terms and Legal References in Both the Old and the New*

⁵⁰ *Id.* at 189.

Testaments (Lawbook Exchange, Ltd. 2000) (1935) (surveying the Bible book by book and explaining the legal concepts therein).

- J.W. Erlich, *The Holy Bible and the Law* (Lawbook Exchange, Ltd. 2002) (1962) (presenting specific legal topics in alphabetical order (Adoption, Agriculture, Aliens, Animals, Bailments, etc.) and the Biblical bases for each of them).
- H.B. Clark, *Biblical Law* (Lawbook Exchange, Ltd. 2000) (1943) (dividing Biblical legal concepts into general subjects (political, civil, economic, penal, and procedural)).
- Howard B. Rand, *Digest of the Divine Law* (1943) (containing a detailed explanation of Old Testament law in theory and in practice).
- R.J. Rushdoony, *Institutes of Biblical Law* (3 vol. 1973-1999) (providing an extended commentary on Biblical law including the Ten Commandments)
- Walter Harrelson, *The Ten Commandments and Human Rights* (1980) (demonstrating the relevance of the Decalogue to modern issues of human rights).

These and numerous other works demonstrate the relevance of the Ten Commandments and Old Testament law in general from the beginnings of American history to the current day.

CONCLUSION

In the original uncut version of the 1956 epic film, *The Ten Commandments*, producer Cecil B. DeMille stepped out on stage and addressed the cinema audience with these words:

Ladies and Gentlemen, young and old. This may seem an unusual procedure, but we have an unusual subject: The birth of freedom. The story of Moses. The theme of this picture is whether men ought to be ruled by God's laws or whether they are to be ruled by the whims of a dictator like Ramses. Are men the property of the State or are they free souls under God? This same battle continues throughout the world today.⁵¹

This Court recognized in *Van Orden v. Perry* that the Ten Commandments have both religious and secular significance. The Ten Commandments monument in Bloomfield symbolizes an American philosophy of law and government: That civil governments are ordained by the "laws of nature and of nature's God," that God has created us in a state of equality and has endowed us with unalienable rights, and that God has a special plan for America that includes blessing and prosperity, a plan that will be realized if we are faithful to Him and His Laws.

⁵¹ Cecil B. DeMille, Introductory Remarks, *The Ten Commandments* (Paramount Studios, 1956).

These principles were embedded in the *Declaration of Independence*. In arguing for ratification of the Constitution by less than a majority of the states, James Madison in 1788 invoked “the transcendent law of nature and of nature’s God.” *The Federalist No. 43*.

The City of Bloomfield’s display of the Ten Commandments is a salutary reminder that American constitutional government owes much to its Hebraic origins in the laws of Moses. Berman concludes:

If there was one truth the ancients held to be self-evident it was that all men were not created equal. If we maintain today that, in fact, they are endowed by their Creator with certain inalienable rights, then it is because we have inherited as part of our cultural heritage notions of equality that were deeply entrenched in the ancient passages of the Pentateuch.⁵²

The Ten Commandments represent the laws of the Hebrew Republic which were instrumental in the development of Western republican thought and American constitutional government. In harmony with this history, courts have repeatedly cited the Ten Commandments as authoritative and illustrative of American legal principles.

This Court has the opportunity in this case to clarify its Establishment Clause jurisprudence and to

⁵² Berman, *Created Equal*, at 175.

recognize that God and His Laws are woven into the very fabric of our civil institutions. A recognition of the formative influence of the Mosaic Law on American law and government will demonstrate this Court's appreciation of the legal origins of the American Commonwealth.

Respectfully submitted,

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